CONCERNING SEARCHES AND SEIZURES

THE Fourth Amendment to the Constitution of the United States provides as follows:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Constitutional provisions more or less similar to this one exist in all the States[1] except in New York where such a limitation appears in the Civil Rights Law.[2]

It is well known that the adoption in 1791 of the first ten amendments resulted from the agitation for a Bill of Rights which attended the ratification of the Constitution.[3] Massachusetts,

[1] Alabama: *I, 9 (1819)*, I, 5 (1901); Arizona: 8 (1911); Arkansas: *II, 9 (1836)*, II, 15 (1874); California: *I, 19 (1849)*, I, 19 (1879); Colorado: II, 7 (1876); Connecticut: I, 8 (1818); Delaware: *I, 6 (1792)*, I, 6 (1897); Florida: *I, 7 (1838)*, Decl. of Rights, 22 (1885); Georgia: *I, 18 (1865)*, I, I, XVI (1877); Idaho: I, 17 (1889); Illinois: *VIII, 7 (1818)*, II, 6 (1870); Indiana: *I, 8 (1816)*, I, 11 (1851); Iowa: *I, 8 (1864)*, I, 8 (1857); Kansas: *I, 14 (1855)*, Bill of Rights, 15 (1859); Kentucky: *XII, 9 (1792)*, Bill of Rights, 10 (1890); Louisiana: *VII, Art. 108 (1864)*, Bill of Rights, 7 (1898); Maine: I, 5 (1819); Maryland: *Decl. of Rights, XXIII (1776)*, Decl. of Rights, 26 (1867); Massachusetts: I, Art. XIV (1780); Michigan: *I, 8 (1835)*, VI, 26 (1850); Minnesota, I, 10 (1857); Mississippi: *I, 9 (1817)*, 3, 23, (1890); Missouri: *XIII, 13 (1820)*, II, 11 (1875); Montana: III, 7 (1889); Nebraska: *I, 11 (1886–87)*, I, 7 (1875); Nevada: I, 18 (1864); New Hampshire: *I, XIX (1784)*, Bill of Rights, 19 (1902); New Jersey: I, 6 (1844); New Mexico: II, 10 (1910); North Carolina: *Decl. of Rights, XI (1776)*, I, 15 (1876); North Dakota: I, 18 (1889); Ohio: *VIII, 5 (1802)*, I, 14 (1851); Oklahoma: II, 30 (1907); Oregon: I, 9 (1857); Pennsylvania: *Decl. of Rights, X (1776)*, I, 8 (1873); Rhode Island: I, 6 (1842); South Carolina: *I, 22 (1868)*, I, 16 (1895); South Dakota: VI, 11 (1899); Tennessee: *XI, 7 (1796)*, I, 7 (1870); Texas: *I, 7 (1845)*, I, 7 (1867); Utah: I, 14 (1895); Vermont: *I, XI (1777)*, I, 11 (1793); Virginia: *Bill of Rights, 10 (1776)*, I, 10 (1902); Washington: I, 7 (1889); West Virginia: *II, 3 (1861–63)*, III, 6 (1872); Wisconsin: I, 11 (1848); Wyoming: I, 4 (1889). The reference in italics is to the earliest Constitution in which such provision appears. Taken from House Documents, 59th Congress, Vols. 87–91, Federal and State Constitutions (Thorpe), Government Printing office 1909 (7 vols.). See also Federal and State Constitutions (Poore), Government Printing office, 1877 (2 vols.).

[2] Section 8, originally adopted in 1828; REV. STAT. pt. 1, ch. 4, § 11.

[3] Weeks *v.* United States, 232 U. S. 383, 390 (1914); Annals of Congress 1789–91 (Gales & Seaton, 1834) pp. 440–468, 783–790, 795–808; 2 BANCROFT, HISTORY OF THE

Virginia and New York led in this agitation. The language of the Fourth Amendment, indeed, is almost identical with that in the Massachusetts Declaration of Rights of 1765,[4] and in the same state's Constitution of 1780.[5]

The demand for this amendment can be traced to two nearly contemporaneous incidents in the history of England and the American colonies.[6] From ancient times it had been customary for justices to issue search warrants for the seizure of stolen property. The circumstances under which such warrants might be issued were discussed by Lord Coke [7] and Sir Matthew Hale.[8] They were looked upon with disfavor. As was said by Lord Camden, they "crept into the law by imperceptible practice." [9] By the time of Charles II, however, search warrants were issued in Star Chamber proceedings to find evidence among the papers of political suspects.[10] It was obviously not convenient to be as specific in such cases as practice had required in searching for stolen goods. So there grew up the easy method of issuing general warrants which permitted the widest discretion to petty officials. These general warrants soon became common in proceedings for

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FORMATION OF THE CONSTITUTION (1882), 241–248, 267, 272, 276, 291, 311, 315; 2 ELLIOT, DEBATES IN STATE CONVENTIONS ON CONSTITUTION (1881), 123, 177; vol. 3, pp. 651–658; THORPE, CONSTITUTIONAL HISTORY OF UNITED STATES (1901), pp. 199–263; CURTIS, CONSTITUTIONAL HISTORY OF UNITED STATES (1896), pp. 153–159; McLoughlin, The Confederation and the Constitution (1905) (Am. Nation, vol. 10), p. 305; Bassett, The Federalist System (1906) (Am. Nation, vol. 11) pp. 21–23.

[4] STIMSON, THE LAW OF THE FEDERAL AND STATE CONSTITUTIONS (1908), pp. 45, 46, 87.

[5] Part 1, Art. XIV.

[6] 4 WIGMORE, EVIDENCE (1905), p. 3126; STORY ON THE CONSTITUTION, 5 ed. (1891), p. 648; Taft, "The Tobacco Trust Decisions," 6 COL. L. REV. (1906), 375, 380; Boyd *v.* United States, 116 U. S. 616 (1886); Stockwell *v.* United States, 3 Cliff. (U. S.) 284 (1870); People *v.* Marxhausen, 204 Mich. 559, 574, 171 N. W. 557 (1919); Colyer *v.* Skeffington, 265 Fed. 17, 25 (1920); Haywood *v.* United States, 268 Fed. (C. C. A. 7th) — (1920).

[7] INSTITUTES, Bk. 4, pp. 176, 177, cited People *ex rel.* Simpson *v.* Kempner, 208 N. Y. 16, 20, 101 N. E. 794 (1913); BLACKSTONE'S COMMENTARIES, Chase's 3 ed., (1908), p. 997.

[8] 2 Pl. Cr. 149, cited People *ex rel.* Simpson *v.* Kempner, 208 N. Y. 16, 20, 101 N. E. 794 (1913). 2 BOUVIER'S LAW DICTIONARY (Rawle's Rev., 1897), p. 969.

[9] Entick *v.* Carrington, 19 How. St. Tr. 1029, 1067 (1765).

[10] Trial of Algernon Sidney for High Treason, 9 How. St. Tr. 818, 853, 868, 901, 985 (1683).

seditious libel against printers and authors.[11] Under George III they became, in effect, authorizations to the so-called messengers to arrest anyone and to search any house in order to apprehend the unnamed authors of the alleged libels and seize their private papers.[12] Wilkes, the great champion against the government in this as in many other matters, by his insistence destroyed the practice.[13] The objectionable warrants were declared illegal by Lord Camden in *Entick* v. *Carrington*,[14] by Lord Mansfield in *Money* v. *Leach*,[15] by Lord Pratt in *Huckle* v. *Money*,[16] and finally by the House of Commons.[17]

All the actions brought by Wilkes and his associates were in trespass against the officers who executed the warrants and the officials who caused them to be issued. It is this remedy

[11] Entick *v.* Carrington, 19 How. St. Tr. 1029, 1069–71 (1765); 2 MAY, CONSTITUTIONAL HISTORY OF ENGLAND (new ed., 1912), p. 124. See DE LOLME, CONSTITUTION OF ENGLAND, 4 ed. (1874), p. 486.

[12] Entick *v.* Carrington, 19 How. St. Tr. 1029, 1063 (1765). See also 1 BOUVIER'S LAW DIC., p. 878; COOLEY, CONSTITUTIONAL LIMITATIONS, 7 ed. (1903), p. 426; and cases collected in 19 How. St. Tr., pp. 1001–1176 and 1406–1416; BROOM, CONSTITUTIONAL LAW AND CASES, 2 ed. (1885), pp. 522–607. Also cases and documents in ROBERTSON, SELECT STATUTES, ETC. TO ILLUSTRATE ENGLISH CONSTITUTIONAL HISTORY (1904), pp. 30, 31, 36, 37, 299–329.

[13] Boyd *v.* United States, 116 U. S. 616, 625 (1886); 4 WIGMORE, EVIDENCE, 3126; 2 MAY, CONST. HIST. OF ENGLAND, 124–130; BROOM, CONST. LAW AND CASES, 2 ed. (1885), pp. 609–611; CHAFEE, FREEDOM OF SPEECH (1920), pp. 296–298.

[14] 19 How. St. Tr. 1029 (1765) (also BROOM, CONST. LAW AND CASES, 2 ed., p. 555). This case did not really involve the question of general warrants, as Entick's name was specifically mentioned. It is, however, directly concerned with the right of search and seizure. See 2 MAY, CONST. HIST. OF ENGLAND (1912), p. 128.

[15] 3 Burr. 1742 (1765) (also 19 How. St. Tr. 1001, and BROOM, CONST. LAW AND CASES, 2 ed., p. 552). The case was decided on the narrow point that the defendant had not conformed to the warrant, but the judges expressed their opinion as to the validity of general warrants. No question of search or seizure was involved.

[16] 2 Wilson, 205 (1763). See also Wilkes *v.* Wood, 19 How. St. Tr. 1153 (1763) (also Lofft, 1).

[17] Commons Journal, April 22 and 25 (1766). See 19 How. St. Tr. 1074 (1765); 1 BOUVIER'S LAW DIC., p. 879; BL. COMM., Chase's 3 ed. (1908), p. 908. See also BROOM, CONST. LAW AND CASES, 2 ed., pp. 607–609. For pamphlet discussion prior to the final vote, see, among others, Townshend Defense of the Minority in the House of Commons on the Question relating to General Warrants (J. Almon, 1764); Lloyd, Defense of the Majority (J. Wilkie, 1764); Meredith, Reply to the Defense of the Majority (J. Almon, 1764); Letter concerning libels, warrants, etc. (J. Almon, 1765); Considerations on the Legality of General Warrants (W. Nicoll, 1765). See also letter to the Earls Egremont and Halifax on the Seizure of Papers (J. Williams, 1763). Most of these are in a collection published by J. Almon, 1766 (N. Y. Public Library, C K., p. v, 135).

which has always been the direct means for the redress of such wrongs.[18]

Lord Camden's opinion in the Entick case is the groundwork for all subsequent discussion. It is considered one of the landmarks of English liberty.[19] Lord Camden links the privilege against unreasonable searches with that against self-incrimination and condemns not only the general character of the warrants but also the fact that they are issued to search out evidence, a ruling of great importance:

"It is very certain, that the law obligeth no man to accuse himself; because the necessary means of compelling self accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it should seem, that search for evidence is disallowed upon the same principle." [20]

At about this time similar proceedings were taking place on this side of the ocean. They related not to political but to commercial offenses, briefly to smuggling. Smuggling was a general offense, both in England and in the colonies.[21] Shortly before the close of the French and Indian war, in order to obtain money for meeting its cost and to suppress an extensive illegal traffic with the enemy islands, the attempt was made to discover smugglers and to confiscate their goods by the use of writs of assistance.[22] These in their oppressive nature much resembled the general warrants used in England and were good indefinitely in the hands of any officer.[23] Otis, then Attorney General in the colony of Massachusetts, resigned his office to attack these warrants. In a speech of great eloquence he questioned the power of Parliament to authorize

[18] See Kilbourn *v.* Thompson, 103 U. S. 168 (1880); West *v.* Cabell, 153 U. S. 78 (1894); United States *v.* Maresca, 266 Fed. 713 (1920); Bell *v.* Clapp, 10 Johns. (N. Y.) 263 (1813); Sailly *v.* Smith, 11 Johns. (N. Y.) 500 (1814); Johnson *v.* Comstock, 14 Hun (N. Y.), 238 (1878); Kercheval *v.* Allen, 220 Fed. (C. C. A. 8th) 262 (1915). See also 49 L. R. A. (N. S.) 770.

[19] See Boyd *v.* United States, 116 U. S. 616, 626 (1886).

[20] 19 How. St. Tr. 1029, 1073, (1765).

[21] 1 TREVELYAN, THE AMERICAN REVOLUTION (1905), pp. 97–101.

[22] See Boyd *v.* United States, 116 U. S. 616, 624 (1886); COOLEY, CONST. LIM., 7 ed., p. 427; 3 CHANNING, HISTORY OF THE UNITED STATES (1912), 2–4; Letter, John Adams to William Tudor, March 29, 1817, reprinted in Old South Leaflets, Vol. VIII, No. 179, p. 59; Howard, Preliminaries of the Revolution (1905) (Am. Nation, vol. 8), pp. 71–73.

[23] 1 BOUVIER'S LAW DIC., Rawle's Rev., p. 879.

such writs. The Court, almost persuaded, sent to England for advice, but pursuant to orders received from the ministers later issued the writs.[24] Here was the beginning of that long course of repression that ended in the American Revolution.[25]

As was said by John Adams: [26]

"Then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the Child Independence was born."

It is, therefore, apparent that the Fourth Amendment did but embody a principle of English liberty, a principle old, yet newly won,[27] that finds another expression in the maxim "every man's home is his castle."[28] Indeed it has been described as deriving direct from Magna Carta.[29]

No further light on contemporary interpretation is obtained from an investigation of the proceedings of the various State Con-

[24] Paxton's case, Quincy's Mass. Rep., 51 (1761), and note by Gray in Appendix, 395; Letter, John Adams to William Tudor, March 29, 1817, reprinted in Old South Leaflets, Vol. VIII, No. 179; American History Leaflets (Channing & Hart), No. 33 (1912) on James Otis's Speech on the Writs of Assistance, 1761. See Green, Remarks before the Massachusetts Historical Society, Dec. 11, 1890 on James Otis's Argument against the Writs of Assistance, 1761, for discussion of sources. See also 3 CHANNING, HIST. OF THE UNITED STATES, 4, 5; Howard, Preliminaries of the Revolution (1905) (Am. Nation, vol. 8), pp. 70–83; 2 BANCROFT, HIST. OF THE UNITED STATES (1890), 546–548; 2 HILDRETH, HIST. OF THE UNITED STATES, 199; COOLEY, CONST. LIM., 7 ed., p. 427; 2 WATSON ON THE CONSTITUTION (1910), 1415; Taft, "The Tobacco Trust Decisions," 6 COL. L. REV. (1906), 375, 380; People *v.* Marxhausen, 204 Mich. 559, 574, 171 N. W. 557 (1919).

[25] See American History Leaflets (Channing & Hart), No. 33 (1912), on James Otis's Speech on the Writs of Assistance, 1761, p. 1; Howard, Prelim. of the Revolution (1905) (Am. Nation, vol. 8), pp. 70, 82; 2 BANCROFT, HIST. OF THE UNITED STATES (1890), p. 546; Taft, "The Tobacco Trust Decisions," 6 COL. L. REV. (1906), 380. See also Haywood *v.* United States, 268 Fed. (C. C. A. 7th) (1920). CHAFEE, FREEDOM OF SPEECH (1920), p. 299.

[26] Letter, John Adams to William Tudor, March 29, 1817, Old South Leaflets, vol. 8, No. 179, p. 60. See also Tudor, Life of Otis (1823), Chap. V, reprinted in Am. Hist. Leaflets, No. 33 (1912) on James Otis's Speech on the Writs of Assistance, (1761), pp. 8–14, quoted in People *v.* Marxhausen, 204 Mich. 559, 574, 171 N. W. 557 (1919).

[27] BLACK, CONST. LAW, 3 ed. (1910), p. 608; 2 STORY ON THE CONSTITUTION, 5 ed. (1891), 648, § 1902; WATSON ON THE CONSTITUTION (1910), p. 1414. See also Lord Camden in Entick *v.* Carrington, 19 How. St. Tr. 1029, 1066 (1765) and Otis's speech, note 24.

[28] COOLEY, CONST. LIM., 7 ed., p. 425; MCCLAIN, CONST. LAW (1905), p. 313; VON HOLST, CONST. LAW (1887), p. 257.

[29] STIMSON, THE LAW OF THE FEDERAL AND STATE CONSTITUTIONS (1908), p. 46. See also Otis's speech, note 24, and Huckle *v.* Money, 2 Wilson 205 (1763).

ventions called to ratify the Constitution and of the proceedings of the Congress which submitted this amendment.[30]

Two things had been declared by Lord Camden: that general warrants were void for uncertainty and that search for evidence violated the principle against self-incrimination. Such, then, would seem to be the law which the Amendment was intended to perpetuate. It is significant that the Amendment itself is in two parts — one which forbids "unreasonable searches," and the other which requires certain specific particulars to be observed before warrants may be issued. This prohibition against "unreasonable searches" must, therefore, have been intended to cover something other than the form of the warrant.

This is the view taken by many of the commentators on the Constitution, notably Cooley.[31] It first received judicial expression in the famous case of *Boyd* v. *United States*.[32] The opinion of Mr. Justice Bradley in this case was objected to by the two concurring Justices,[33] and has since been variously criticized on the ground that the discussion in relation to the Fourth Amendment was *obiter*.[34]

It must be conceded at the outset that this criticism is just. The case turned upon the validity of a statute which provided that if the claimant of property, under forfeiture at the instance of revenue officers, failed to produce invoices called for by the District Attorney, then the allegations of the District Attorney would

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[30] See authorities in note 3, and particularly Annals of Congress, 1789–1791 (Gales and Seaton, 1834), at pp. 452, 456, 783; THORPE, CONST. HISTORY OF UNITED STATES (1901), pp. 207, 214, 226, 245, 257; 1 ELLIOTT, DEBATES IN STATE CONVENTIONS ON CONSTITUTION (1881), 328; vol. 2, p. 177; vol. 3, p. 657. It is, however, interesting to note that the amendment underwent a radical change of form, apparently, after adoption by the House of Representatives, in a Committee of Three appointed to prepare the Amendments to be sent to the Senate. In the original form the amendment seemed directed only against general warrants, like the Virginia rather than the Massachusetts Constitution.

[31] COOLEY, CONST. LIM., 7 ed., p. 431; see also BLACK, CONST. LAW, 3 ed. (1910), p. 613. See general discussion in CHAFEE, FREEDOM OF SPEECH, pp. 299–301.

[32] 116 U. S. 616 (1886).

[33] *Ibid.*, 639–641.

[34] See 4 COL. L. REV., 60, and cases cited; Taft, "The Tobacco Trust Decisions," 6 COL. L. REV. 375, 384, 386; 4 WIGMORE, EVIDENCE, 3125–3127; Adams *v.* New York, 192 U. S. 585, 597 (1904); Hale *v.* Henkel, 201 U. S. 43, 71, 73 (1906); United States *v.* Wilson, 163 Fed. 338, 340 (1908); but see Weeks *v.* United States, 232 U. S. 383 (1914); Silverthorne Lumber Co. *v.* United States, 251 U. S. 385 (1920).

be deemed admitted. In the case in question, the invoices had been produced under protest and used as part of the government's case. It was held by the Court that this was error in that the statute in effect authorized an unreasonable search and also that the claimant was compelled to testify against himself. This second consideration would have sufficed for the decision of the case, and such was the view of the minority.

On the other hand, as has already been seen, the connection between the privilege against self-incrimination and the right to be free from unreasonable searches is much closer than the critics of the opinion concede.[35] The majority opinion so truly reflects the spirit of the American people, that it is recognized as a basic authority.[36]

The importance of this opinion is two-fold: it decides that any measure, regardless of its form, which accomplishes the same result as an unauthorized search will be deemed similarly repugnant to the Fourth Amendment:

"It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be, because it is a material ingredient, and effects the sole object and purpose of search and seizure." [37]

It also distinguishes between the search for things themselves prohibited, and that for books and papers sought as evidence: [38]

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[35] See 4 WIGMORE, EVIDENCE, 3122–3127. Wigmore's discussion of the nature of the privilege against self-incrimination at pages 3122–3124 is foreshadowed in one of the pamphlets written at the time of the Wilkes cases: Considerations on the Legality of General Warrants (W. Nicoll, 1765). But the opinion of the antagonists of the warrants seems to have been clearly that search for evidence itself was unlawful as a violation of the privilege. See, for instance, Meredith's Reply, Letter concerning Libels, and Letter to the Earls Egremont and Halifax, cited *supra*, note 17. See also CHAFEE, FREEDOM OF SPEECH (1920), p. 303 and note, and p. 307.

[36] See I. S. C. C. *v.* Brimson, 154 U. S. 447 (1894); Interstate Com. Comm. *v.* Baird, 194 U. S. 25 (1904); Wilson *v.* United States, 221 U. S. 361 (1911); Weeks *v.* United States, 232 U. S. 383 (1914); Perlman *v.* United States, 247 U. S. 7 (1918), and citations in Shepard.

[37] 116 U. S. 616, 622 (1886).

[38] Overruling in this connection Stockwell *v.* United States, 3 Cliff. (U. S.) 284 (1870) and other cases holding such searches constitutional. See criticism of earlier practice in Eaton, Discussion of the Constitutionality of the Act of Congress of March 2, 1867 (N. Y. Chamber of Commerce, 1874).

"The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. . . . In the one case, the government is entitled to the possession of the property; in the other it is not." [39]

The Boyd case also decided that the Fourth Amendment applied to forfeiture cases as well as to strictly criminal proceedings.[40]

Now, it had been the unvarying law that upon the trial of a criminal case, the Court, largely to prevent raising a collateral issue, would receive any competent evidence without inquiring into the means by which it had been procured.[41] Nevertheless, on the authority of the Boyd case, a Federal District Court decided that the mere reception on the trial of evidence, obtained as the result of illegal search, constituted reversible error.[42] An identical result has been reached in Iowa and a few other states,[43] but the old rule was reaffirmed by the Supreme Court of the United States on appeal from a New York decision.[44] This is in accord with the overwhelming weight of authority.[45]

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[39] 116 U. S. 616, 623 (1886).

[40] *Ibid.*, 633.

[41] Com. *v.* Dana, 2 Metc. (Mass.) 329 (1841); State *v.* Flynn, 36 N. H. 64 (1858); 4 WIGMORE, EVIDENCE, 2954; 4 COL. L. REV. 60; 14 COL. L. REV. 338; 13 HARV. L. REV. 302; 33 HARV. L. REV. 869; see below notes 43–48 for recent cases.

[42] United States *v.* Wong Quong Wong, 94 Fed. 832 (1899). See also Flagg *v.* United States, 233 Fed. (C. C. A., 2d) 481 (1916).

[43] State *v.* Sheridan, 121 Ia. 164, 96 N. W. 730 (1903); State *v.* Height, 117 Iowa, 650, 661 *et seq.*, 91 N. W. 935 (1902); Blum *v.* State, 94 Md. 375, 51 Atl. 26 (1902); Town of Blacksburg *v.* Beam, 104 S. C. 146, 88 S. E. 141 (1916); State *v.* Salmon, 73 Vt. 212 (1901) [but see State *v.* Krinski, 78 Vt. 162, 62 Atl. 37 (1905)]; see also Underwood *v.* State, 13 Ga. App. 206, 78 S. E. 1103 (1913), overruled in Calhoun *v.* State, 144 Ga. 679, 87 S. E. 893 (1915).

[44] Adams *v.* New York, 192 U. S. 585 (1904).

[45] Shields *v.* State, 104 Ala. 35, 16 So. 85 (1893); Pope *v.* State, 168 Ala. 33, 53 So. 292 (1910); O'Neal *v.* Parker, 83 Ark. 133, 103 S. W. 165 (1907); People *v.* Le Doux, 155 Cal. 535, 546–548, 102 Pac. 517 (1909); Imboden *v.* People, 40 Colo. 142, 180, 90 Pac. 608 (1907); State *v.* Griswold, 67 Conn. 290, 34 Atl. 1046 (1896) (strong dissent); Lee *v.* State, 69 Fla. 255, 67 So. 883 (1915); Williams *v.* State, 100 Ga. 511, 28 S. E. 624 (1897); Calhoun *v.* State, 144 Ga. 679, 87 S. E. 893 (1915); State *v.* Anderson, 31 Idaho, 514, 174 Pac. 124 (1918) (strong dissent); Gindrat *v.* People, 138 Ill. 103, 27 N. E. 1085 (1891); People *v.* Paisley, 288 Ill. 310, 315, 123 N. E. 573 (1919); State *v.* Miller, 63 Kan. 62, 64 Pac. 1033 (1901); State *v.* Turner, 82 Kan. 787, 109 Pac. 654 (1910); State *v.* Aspara, 113 La. 940, 951, 37 So. 883 (1904); City of Shreveport *v.*

The Supreme Court of the United States upheld the conviction in New York on the double ground that there was no illegality because the seizure was incidental to the execution of a valid warrant [46] (although testimony was offered to show that there never had been any warrant) and that the issue could not be collaterally raised. The Federal Courts have generally ruled in accordance with the second ground of the decision in this case,[47] even where the seizure was without any warrant whatever.[48]

Knowles, 136 La. 770, 67 So. 824 (1915); State *v.* Burroughs, 72 Me. 479 (1881); Lawrence *v.* State, 103 Md. 17, 33–37, 63 Atl. 96 (1906); Com. *v.* Tibbetts, 157 Mass. 519, 32 N. E. 910 (1893); Com. *v.* Tucker, 189 Mass. 457, 76 N. E. 127 (1905); People *v.* Aldorfer, 164 Mich. 676, 130 N. W. 351 (1911); State *v.* Stoffels, 89 Minn. 205, 94 N. W. 675 (1903); State *v.* Rogne, 115 Minn. 204, 132 N. W. 5 (1911); Pringle *v.* State, 108 Miss. 802, 67 So. 455 (1914); State *v.* Pomeroy, 130 Mo. 489, 32 S. W. 1002 (1895); State *v.* Sharpless, 212 Mo. 176, 197, 111 S. W. 69 (1908); State *v.* Fuller, 34 Mont. 12, 23, 85 Pac. 369 (1906); Nixon *v.* State, 92 Neb. 115, 138 N. W. 136 (1912); State *v.* Miller, 71 N. J. L. 527, 60 Atl. 202 (1905); but see State *v.* Mausert, 88 N. J. L. 286, 95 Atl. 991 (1915); State *v.* Barela, 23 N. M. 395, 168 Pac. 545 (1917); People *v.* Adams, 176 N. Y. 351, 68 N. E. 636 (1903); People *v.* McDonald, 177 App. Div. 806, 165 N. Y. Supp. 41 (1917); State *v.* Wallace, 162 N. C. 622, 78 S. E. 1 (1913); Silva *v.* State, 6 Okla. Cr. 97, 116 Pac. 199 (1911); State *v.* McDaniel, 39 Ore. 161, 65 Pac. 520 (1901); State *v.* Ware, 79 Ore. 367, 154 Pac. 905, 155 Pac. 364 (1916); State *v.* Atkinson, 40 S. C. 363, 18 S. E. 1021 (1893); but see Town of Blacksburg *v.* Beam, 104 S. C. 146, 88 S. E. 441 (1916); Cohn *v.* State, 120 Tenn. 61, 109 S. W. 1149 (1907); State *v.* Reese, 44 Utah, 256, 140 Pac. 126 (1914); State *v.* Krinski, 78 Vt. 162, 62 Atl. 37 (1905); State *v.* Edwards, 51 W. Va. 220, 41 S. E. 429 (1902); State *v.* Sutter, 71 W. Va. 371, 76 S. E. 811 (1912). See also notes in 136 Am. St. Rep. 129; 29 L. R. A. 818; 59 L. R. A. 466; 8 L. R. A. (N. S.) 762; 34 L. R. A. (N. S.) 58; L. R. A. 1915 B. 834; L. R. A. 1916 E. 715. It should be noted that a number of these cases really relate to the privilege against self-incrimination and that in many states the issue has not been squarely presented as the search involved was held legal.

[46] This ground of the decision seems to conflict with the requirement of the Fourth Amendment as to particularity of description of the thing to be seized. See *infra*, notes 115 and 127.

[47] N. Y. Cent., etc. R. R. *v.* United States, 165 Fed. (C. C. A. 1st) 833 (1908); Hardesty *v.* United States, 164 Fed. (C. C. A. 6th) 420 (1908); Hartman *v.* United States, 168 Fed. (C. C. A. 6th) 30 (1909); Ripper *v.* United States, 178 Fed. (C. C. A. 8th) 24 (1910); Lum Yan *v.* United States, 193 Fed. (C. C. A. 9th) 970 (1912); May *v.* United States, 199 Fed. (C. C. A. 8th) 53 (1912); Lyman *v.* United States, 241 Fed. (C. C. A. 9th) 945 (1917); Rice *v.* United States, 251 Fed. (C. C. A. 1st) 778 (1918); MacKnight *v.* United States, 263 Fed. (C. C. A. 1st) 832 (1920); Youngblood *v.* United States, 266 Fed. (C. C. A. 8th) 795 (1920); but see Flagg *v.* United States, 233 Fed. 481 (C. C. A. 2nd) 481 (1916); United States *v.* Sassone (S. D. N. Y. 1920) N. Y. L. J. 3/15/20; and *Ex parte* Jackson, 263 Fed. 110 (1920).

[48] Youngblood *v.* United States, 266 Fed. (C. C. A. 8th) 795 (1920). Lyman *v.* United States, 241 Fed. (C. C. A. 9th) 945 (1917); Lum Yan *v.* United States, 193 Fed. (C. C. A. 9th) 970 (1912); but see Flagg *v.* United States, 233 Fed. (C. C. A. 2nd) 481 (1916); United States *v.* Sassone, (S. D. N. Y. 1920) (N. Y. L. J. 3/15/20); *Ex parte*

In the course of its opinion in the Adams case, the Court, while reaffirming the well-settled rule that the Fourth Amendment did not apply to the States,[49] expressed some doubt as to the effect of the Fourteenth Amendment.[50] In a case involving the privilege against self-incrimination this doubt was finally resolved in favor of the States.[51] In the Adams case the Court also reaffirmed the right to issue search warrants not only for stolen property, but also for any property such as smuggled goods, illegally owned liquor, gambling paraphernalia, etc., which the state had a right to destroy.[52] In this connection attention should be called to the many cases upholding the right of the police, upon making a lawful arrest without a search warrant, to search the person of the suspect and the room occupied by him, and to seize any instruments or evidence of crime thus discovered.[53]

It was not for several years that a way was found, in the Federal

Jackson, 263 Fed. 110 (1920). A departure from the general rule is to be found in a series of informal rulings by Judge Mayer in the Southern District of New York on April 28, 1920. Upon oral statements made on the call of the calendar of a very large number of prohibition cases that the informations in a large percentage of the cases were based on evidence obtained as the result of searches without any warrants, the court instructed the district attorney to discontinue the prosecutions in such cases.

[49] 192 U. S. 585, 594 (1904). See also Bolln *v.* Nebraska, 176 U. S. 83 (1900); Ohio *ex rel.* Lloyd *v.* Dollison, 194 U. S. 445 (1904); Jack *v.* Kansas, 199 U. S. 372 (1905).

[50] 192 U. S. 585, 594 (1904). See also Cons. Rendering Co. *v.* Vermont, 207 U. S. 541 (1908).

[51] Twining *v.* State of New Jersey, 211 U. S. 78 (1908).

[52] 192 U. S. 585, 598 (1904). See also Flint *v.* Stone Tracy Co., 220 U. S. 107 (1911); Public Clearing House *v.* Coyne, 194 U. S. 497 (1904); United States *v.* Jones, 230 Fed. 262 (1916); United States *v.* Welsh, 247 Fed. 239 (1917); Haywood *v.* United States, 268 Fed. (C. C. A. 7th) (1920); Sailly *v.* Smith, 11 Johns. (N. Y.) 500 (1814); 2 BOUVIER'S LAW DIC., p. 969; COOLEY, CONST. LIM., p. 432; 24 HARV. L. REV. 661; 13 HARV. L. REV. 302. See also CHAFEE, FREEDOM OF SPEECH, p. 301.

[53] See Weeks *v.* United States, 232 U. S. 383, 392 (1914); United States *v.* Welsh, 247 Fed. 239 (1917); United States *v.* Wilson, 163 Fed. 338 (1908); United States *v.* Mills, appeal dismissed 220 U. S. 549 (1911), 185 Fed. 318 (1911); United States *v.* Hart, 214 Fed. 655 (1914); Smith *v.* Jerome, 47 Misc. 22, 93 N. Y. Supp. 202 (1905); Houghton *v.* Bachman, 47 Barb. (N. Y.) 388 (1866); 24 HARV. L. REV. 661; United States *v.* Murphy, 264 Fed. 842 (1920); Welsh *v.* United States, 267 Fed. (C. C. A. 2nd) 819 (1920). See also Matter of Dodge, 191 App. Div. 948, 181 N. Y. Supp. 933 (1920) affirming without opinion an order denying a motion for the return of evidentiary papers taken from petitioner at the time of his arrest without warrant for alleged bookmaking (Memorandum of argument, N. Y. L. J. 4/17/20). See also 18 L. R. A. (N. S.) 253; L. R. A. 1916 C. 1017. But see United States *v.* Mounday, 208 Fed. 186 (1913); Flagg *v.* United States, 233 Fed. (C. C. A. 2nd) 481 (1916); and Colyer *v.* Skeffington, 265 Fed. 17, 44 (1920), disapproving wholesale seizures made at the time of arrests.

Courts at least, to circumvent the effect of the decision in the Adams case.[54] In 1908 for the first time, so far as recorded cases indicate, a motion was made before trial to compel the District Attorney to return papers alleged to have been unlawfully seized.[55] The practice was approved on the ground that the question raised was one of general principles not covered by the law of evidence, but the application was denied on the ground that there had been no unlawful seizure. The next reported instance of such a motion was successful,[56] and resulted in an order returning the books and papers on the authority of the Boyd case. It is interesting to note that the District Attorney refused to obey this order, was punished for contempt and appealed to the Supreme Court. The appeals were dismissed on the ground that no constitutional question was involved.[57] The Supreme Court stated that the lower Court had the power to return the seized papers not only because of the constitutional privilege but also because of the Court's inherent power to correct abuses of discretion in the cases of its own officers.[58] These cases definitely established that practice, which has since been very generally followed.[59]

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[54] But see the vain attempt made in Smith *v.* Jerome, 47 Misc. 22, 93 N. Y. Supp. 202 (1905) to accomplish this by injunction.

[55] United States *v.* Wilson, 163 Fed. 338 (1908).

[56] United States *v.* Mills (appeal dismissed 220 U. S. 549) (1911), 185 Fed. 318 (1911).

[57] Wise *v.* Mills, 220 U. S. 549 (1911); Wise *v.* Henkel, 220 U. S. 556 (1911).

[58] At pp. 555, 558.

[59] See Weeks *v.* United States, 232 U. S. 383 (1914); Silverthorne Lumber Co. *v.* United States, 251 U. S. 385 (1920); United States *v.* M'Hie, 194 Fed. 894 (1912); United States *v.* Mounday, 208 Fed. 186 (1913); United States *v.* Hart, 214 Fed. 655 (1914); United States *v.* Hee, 219 Fed. 1019 (1915); United States *v.* Jones, 230 Fed. 262 (1916); United States *v.* Abrams, 230 Fed. 313 (1916); United States *v.* Friedberg, 233 Fed. 313 (1916); United States *v.* Welsh, 247 Fed. 239 (1917); Veeder *v.* United States, 252 Fed. (C. C. A. 7th) 414 (1918); United States *v.* Gouled, 253 Fed. 770 (1918); *In re* Tri-State Coal & Coke Co. 253 Fed. 605 (1918); *In re* Rosenwasser Bros., Inc., 254 Fed. 171 (1918); *In re* Marx, 255 Fed. 344 (1918); Fitter *v.* United States, 258 Fed. (C. C. A. 2nd) 567 (1919); Laughter *v.* United States, 259 Fed. (C. C. A. 6th) 94 (1919); Coastwise Lumber & Supply Co. *v.* United States, 259 Fed. (C. C. A. 2nd) 847 (1919); United States *v.* Hill, 263 Fed. 812 (1920); United States *v.* Maresca, 266 Fed. 713 (1920). Welsh *v.* United States, 267 Fed. (C. C. A. 2nd) 819 (1920); United States *v.* Rykowski, 267 Fed. 866 (1920); United States *v.* Brasley, 268 Fed. 59 (1920); Haywood *v.* United States, 268 Fed. (C. C. A. 7th) (1920). See also 24 HARV. L. REV. 661. In the state courts this method does not seem to have been much used. But see People *v.* Marxhausen, 204 Mich. 559, 574, 171 N. W. 557 (1919), where the authorities are carefully considered and the correct rule is well stated.

From this the next step became inevitable — what would happen if such a motion were denied and the evidence used? The question was determined in *Weeks* v. *United States* [60] by a reversal of conviction on the ground that such denial constituted prejudicial error. Although the Adams case is distinguished partly on the ground that the search was made without a warrant, the reasoning of the Court would apply equally well where the warrant was defective:

"If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution." [61]

In *Flagg* v. *United States* [62] the same result was reached where no motion was made before trial, the papers having been voluntarily returned after the desired information had been obtained from them. One of the judges regretted the rule on the ground that subordinates were thereby enabled to prevent convictions by making illegal seizures out of excess of zeal or corrupt intent.[63] It is submitted that the balance of public policy favors the doctrine of the Weeks case. Prosecutors can be counted on to restrain their subordinates when reversals follow raids, whereas if they are free to convict no matter how the evidence is obtained, illegal searches and seizures will multiply. In one case, however, the court refused to reverse although the papers used on the trial had been illegally seized and a motion for their return duly made on the sole ground that their value as evidence was merely cumulative.[64]

A motion to dismiss an indictment or information on the ground that it was based upon evidence procured through illegal search seems never to have been successfully made in the Federal Courts,[65]

[60] 232 U. S. 383 (1914). See 14 COL. L. REV. 338. Followed in United States *v.* Hill, 263 Fed. 812 (1920); United States *v.* Keydoszius, 267 Fed. 866 (1920).

[61] 232 U. S. 383, 393 (1914).

[62] 233 Fed. (C. C. A. 2nd) 481 (1916).

[63] *Ibid.*, 486.

[64] Laughter *v.* United States, 259 Fed. (C. C. A. 6th) 94, 99 (1919).

[65] See United States *v.* Gouled, 253 Fed. 242 (1918); United States *v.* Welsh, 247 Fed. 239 (1917), for attempts to accomplish this result which failed because the court held the search had not been illegal. See also United States *v.* Silverthorne, 265 Fed. 853 (1920), where the motion was denied because the property did not belong to the moving party and Haywood *v.* United States, 268 Fed. (C. C. A. 7th) (1920), where a

although in a recent case leave to file an information was refused on the ground that the only evidence had been obtained by wrongful search,[66] and in another recent case a plea in abatement, based on an unlawful search from which the evidence presented to the Grand Jury had been indirectly obtained, was sustained with the suggestion that the facts relating thereto be presented before the trial of the main issue.[67]

There can be no logical objection to such a motion where it appears that the indictment or information was based solely, or even in preponderant measure, upon such evidence. This was, in effect, decided some time ago where the privilege of self-incrimination was involved and the question arose upon demurrer to a plea in abatement.[68] In the recent case of *People* v. *Marxhausen* [69] the return of liquor illegally seized and the dismissal of a complaint for violation of the liquor law based upon the illegal seizure was affirmed in a well-considered opinion.

It follows, of course, that evidence so obtained should not be used before the Grand Jury any more than at the trial, and it has been so held where the papers or other property were ordered returned before indictment.[70] In *Silverthorne Lumber Company* v. *United States* [71] the Supreme Court refused to punish for contempt a corporation and its officers that failed to obey a subpoena to produce before a Grand Jury considering indictments against those officers, papers of the corporation which had been illegally seized and returned on motion. The Court held that although the papers might have been produced by subpoena in the first place [72] to permit their use after the illegal seizure would deprive the corporation

denial on similar grounds was upheld. But note the recent informal ruling by Judge Mayer in the Southern District of New York on April 28, 1920, instructing the district attorney to discontinue the prosecutions in a very large number of prohibition cases on this ground upon oral statement of counsel on the call of the calendar.

[66] United States *v.* Quaritius, 267 Fed. 227 (1920).

[67] United States *v.* Silverthorne, 265 Fed. 853, 859 (1920).

[68] State *v.* Spence, 173 Ind. 99, 89 N. E. 488 (1909).

[69] 204 Mich. 559, 574, 171 N. W. 557 (1919). For a discussion of the law relating to searches for liquor, see note to this case in 3 A. L. R. 1514. See also United States *ex rel.* Soeder *v.* Crossen, 264 Fed. 459 (1920).

[70] United States *v.* Mounday, 208 Fed. 186 (1913); *In re* Marx, 255 Fed. 344 (1918).

[71] 251 U. S. 385 (1920); see 33 HARV. L. REV. 869; 20 COL. L. REV. 484; 29 YALE L. J. 553.

[72] 251 U. S. 385, 393 (1920). See Hale *v.* Henkel, 201 U. S. 43, 74 (1906); Wilson *v.* United States, 221 U. S. 361, 382 (1911). See also United States *v.* Louis & Nash

of its rights under the Fourth Amendment. Thus the Supreme Court has given clear notice that it will give the fullest practical effect to the Constitutional guaranty:

"The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source, they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used in the way proposed." [73]

The question of a corporation's rights under the Fourth Amendment had been presented in a case arising out of the Tobacco Trust investigation. While the Supreme Court held that the corporation could not plead the privilege against self-incrimination,[74] it was assumed to have rights under the Fourth Amendment. The existence of such rights was later doubted by the Circuit Court of Appeals in the Second District [75] and finally made certain by the Supreme Court in the Silverthorne case.[76]

The Hale case also presented the question of the privilege of the officer in whose custody the records of the corporation might be. An immunity statute prevented the officer from claiming any personal privilege [77] and it was decided that he could not claim the corporation's privilege.[78] In a subsequent case, however, the officer claimed the right to withhold corporate records under the Fourth and Fifth Amendments, on personal grounds, claiming that the records consisted of letters written by himself.[79] The Supreme

R. R., 236 U. S. 318 (1915); Cons. Rendering Co. *v.* Vermont, 207 U. S. 541 (1908); Taft, "The Tobacco Trust Decisions," 6 COL. L. REV. 375 (1906).

[73] 251 U. S. 385, 392 (1920).

[74] Hale *v.* Henkel, 201 U. S. 43, 76 (1906). See also Wilson *v.* United States, 221 U. S. 361 (1911); Taft, "The Tobacco Trust Decisions," 6 COL. L. REV. 375 (1906); Proskauer, "Corporate Privilege against Self Incrimination," 8 COL. L. REV. 445 (1908).

[75] Linn *v.* United States, 251 Fed. (C. C. A. 2nd), 476 (1918).

[76] Silverthorne Lumber Co. *v.* United States, 251 U. S. 385, 393 (1920).

[77] See in this connection Counselman *v.* Hitchcock, 142 U. S. 547 (1892); I. S. C. C. *v.* Baird, 194 U. S. 25 (1904); Jack *v.* Kansas, 199 U. S. 372 (1905); WIGMORE, EVIDENCE (1905) p. 230 in Supplement.

[78] Hale *v.* Henkel, 201 U. S. 43, 75 (1906).

[79] Wilson *v.* United States, 221 U. S. 361 (1911). See also Dreier *v.* United States, 221 U. S. 394 (1911); Linn *v.* United States, 251 Fed. (C. C. A. 2nd), 476 (1918); *In re* Rosenwasser Bros., Inc., 254 Fed. 171 (1918).

Court brushed both contentions aside, holding that a reasonable subpoena was not an unreasonable search and that the property of the corporation in no matter whose custody was subject to inspection by the state. Where the corporation had been dissolved the same result was reached.[80]

In a very recent case it was held that the members of an unincorporated membership association had no standing to move for the return of papers seized under a defective warrant from offices of the association and, therefore, could not object to the use of such papers as evidence against them.[81] The Court, in effect, treated the membership association as though it had been a corporation and also intimated that there was no redress for the seizure of property belonging to the individuals if taken from the possession of the association. This last ruling, it is submitted, is at variance with both the letter and the spirit of the Constitution, as it ignores the security given to the papers and effects as well as the houses of the people, and because it permits the Government to benefit by illegal searches so long as it is careful not to take property from the possession of its owners.

It has, similarly, been held that a defendant cannot complain of the seizure of books and papers neither his own, nor in his possession.[82] It is also the well-settled rule that where the papers are public records the defendant's custody will not avail him against their seizure.[83] Where papers are taken out of the custody of one not their owner, it seems that such person can object if there has been no warrant, or if the warrant was directed to him,[84] but not if the warrant is directed to the owner.[85] If the defendant's property is lawfully out of his possession it makes no difference by what means it comes into the Government's hands as there has

[80] Wheeler *v.* United States, 226 U. S. 478 (1913).

[81] Haywood *v.* United States, 268 Fed. (C. C. A. 7th) (1920).

[82] Moy Wing Sun *v.* Prentis, 234 Fed. (C. C. A. 7th), 24 (1916); Tsuie Shee *v.* Backus, 243 Fed. (C. C. A. 9th), 551 (1917); United States *v.* Silverthorne, 265 Fed. 853 (1920). The owner may, however, object. See Newberry *v.* Carpenter, 107 Mich. 567, 65 N. W. 530 (1895), and Owens *v.* Way, 141 Ga. 796, 82 S. E. 132 (1914).

[83] See Hale *v.* Henkel, 201 U. S. 43 (1906); Dreier *v.* United States, 221 U. S. 394 (1911). In People *v.* Coombs, 158 N. Y. 532, 53 N. E. 527 (1899), this rule was applied to papers fraudulently prepared to cover up the officer's crime, but not actually filed.

[84] Veeder *v.* United States, 252 Fed. (C. C. A. 7th), 414 (1918).

[85] See Schenck *v.* United States, 249 U. S. 47 (1919) and Haywood *v.* United States, 268 Fed. (C. C. A. 7th) (1920).

been no compulsion exercised upon him.[86] But the privilege extends to letters in the mails.[87] The privilege extends to the office as well as the home.[88]

On the other hand, to enable a person to claim the privilege, it is not necessary that he be a party to any pending criminal proceeding. He can object to the illegal seizure of his own property and resist a forcible production of it even if he is only called as a witness.[89]

Nor must a person be a citizen to be entitled to the protection of the Fourth Amendment.[90] Accordingly, evidence obtained as the result of illegal search and seizure cannot be considered in determining the facts necessary to justify deportation of an alien.[91] It seems that in such proceeding no preliminary motion need be made, at least where the manner of obtaining the evidence is disclosed by the Government in the course of the hearing.[92] The following principles for the decision of deportation cases have recently been laid down by the Department of Labor: [93]

[86] Johnson *v.* United States, 228 U. S. 457 (1913); Perlman *v.* United States, 247 U. S. 7 (1918). See also Haywood *v.* United States, 268 Fed. (C. C. A. 7th) 00 (1920).

[87] See *Ex parte* Jackson, 96 U. S. 727, 733–735 (1877). See BROOM, CONST. LAW AND CASES, 2 ed. (1885), pp. 612–613 for contrary English view.

[88] Silverthorne *v.* United States, 251 U. S. 385 (1920); United States *v.* Mills, 185 Fed. 318 (1911); United States *v.* M'Hie, 194 Fed. 894 (1912); United States *v.* Jones, 230 Fed. 262 (1916); United States *v.* Abrams, 230 Fed. 313 (1916); Flagg *v.* United States, 233 Fed. (C. C. A. 2d), 481 (1916); United States *v.* Friedberg, 233 Fed. 313 (1916); United States *v.* Sassone, N. Y. L. J. (S. D. N. Y.) 3/15/20 (1920); see also *Addenda*. A contrary ruling seems to have been made in a recent liquor case: United States *v.* Lee, N. Y. World (E. D. N. Y.) 5/15/20 (1920).

[89] Counselman *v.* Hitchcock, 142 U. S. 547 (1892); Ballmann *v.* Fagin, 200 U. S. 186 (1906); and see Weeks *v.* United States, 232 U. S. 383, 392 (1914). See also Newberry *v.* Carpenter, 107 Mich. 567, 65 N. W. 530 (1895), and Owens *v.* Way, 141 Ga. 796, 82 S. E. 132 (1914).

[90] United States *v.* Wong Quong Wong, 94 Fed. 832 (1899); United States *v.* Sassone, N. Y. L. J. (S. D. N. Y.) 3/15/20 (1920); *Ex parte* Jackson, 263 Fed. 110 (1920); Colyer *v.* Skeffington, 265 Fed. 17, 24, 27 (1920).

[91] United States *v.* Wong Quong Wong, 94 Fed. 832 (1899); *Ex parte* Jackson, 263 Fed. 110 (1920); Colyer *v.* Skeffington, 265 Fed. 17 (1920). CHAFEE, FREEDOM OF SPEECH, p. 241 and note. Professor Chafee takes the position that there is no authority for any search warrants in deportation proceedings.

[92] *Ex parte* Jackson, 263 Fed. 110 (1920). See also Colyer *v.* Skeffington, 265 Fed. 17 (1920). These cases illustrate the extent to which official lawlessness has been carried in the anti-Red agitation. The opinions of Judge Bourquin and Judge Anderson are notable vindications of the constitutional safeguards.

[93] Matter of Thomas Truss (Asst. Secy. of Labor Post, 4/6/20), Congressional Record, April 12, 1920, pp. 5985–5986.

"10. Statements of the accused alien, whether oral or in writing, made while he is in custody and without opportunity fairly afforded him from the beginning to be represented by counsel, and without clear warning that anything he says may be used against him will be disregarded pursuant to the principle *Re Jackson* (263 Fed. 110) and of *Silverthorne* v. *United States* (251 U. S. 385) as having been unlawfully obtained.

"11. Exhibits seized upon the premises or person of the accused alien without lawful process will be disregarded pursuant both to the principle and the precise decision in *Re Jackson* and *Silverthorne* v. *United States*."

Searches and seizures have for a variety of reasons been upheld, although under defective warrants, or none at all. It has already been seen that such searches might be made at the time of arrest.[94] Evidence so obtained can be used upon a prosecution for a crime other than the one for which the arrest was made.[95] Apparently a seizure made as the result of trickery is not open to attack,[96] although it is doubtful if a seizure made as the result of a claim of right by an officer in fact having no warrant would be upheld, as in such case the owner of the property acts under a compulsion, none the less effective because fictitious.[97] Seizure by private individuals does not affect the Government's rights,[98] and, similarly, seizure by state officials will not affect a prosecution in the United States Courts [99] unless there was such authorization in advance,[100] or ratification thereafter,[101] as to make the individuals or the State officials in effect representatives of the Government.

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[94] See note 53, *supra*.

[95] United States *v.* Murphy, 264 Fed. 842 (1920). In this case it was intimated that evidence obtained under a properly issued search warrant could be used on a trial for an offense different from the one set forth in the affidavit on which the warrant was obtained. But see *Addenda* for question certified to the Supreme Court which raises this point.

[96] United States *v.* Maresca, 266 Fed. 713 (1920). But see *Addenda* for question certified to the Supreme Court which raises this point.

[97] See United States *v.* Abrams, 230 Fed. 313 (1916).

[98] See Bacon *v.* United States, 97 Fed. (C. C. A. 8th), 35 (1899).

[99] Weeks *v.* United States, 232 U. S. 383, 398 (1914). See Rice *v.* United States, 251 Fed. (C. C. A. 1st), 778 (1918); Youngblood *v.* United States, 266 Fed. (C. C. A. 8th), 795 (1920).

[100] United States *v.* Welsh, 247 Fed. 239, 240 (1917).

[101] Flagg *v.* United States, 233 Fed. (C. C. A. 2nd), 481, 483 (1916).

Illegality in the original seizure may moreover be waived,[102] as by consenting to the impounding of the papers with the clerk,[103] and cannot be taken advantage of by a defendant who used the papers himself and against whom the papers were not used by the Government.[104]

Furthermore, unless there has been a compulsory production of the property, its use violates no constitutional provision. So the deposit of exhibits in a patent suit justifies their use in a criminal proceeding,[105] and papers found in a trunk obtained by use of a baggage check taken from a prisoner at time of arrest may be used at the trial.[106] Similarly, if the papers have been voluntarily surrendered to the District Attorney or investigating officers no objection to their use can be made,[107] even though the District Attorney may have broken an agreement to return the papers.[108] But a delivery made as the result of promise of immunity or threat by officers is not voluntary.[109] Nor is it necessary for the owner to await the application of actual force, and no acquiescence will be inferred because the property is turned over when demanded by an officer determined to execute a search warrant.[110]

A compulsory surrender of letters being written by a prisoner made as the result of usual regulations in a prison [111] or of books as

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[102] See United States *v.* Maresca, 266 Fed. 713 (1920). The *dictum* in that case, that where papers have been improperly seized and ordered returned, the order should be so framed as to permit the district attorney to retain the papers under a claim of title arising out of a gift or waiver subsequent to the seizure, is open to serious criticism, as it tends to render the whole proceeding by motion an idle farce.

[103] Farmer *v.* United States, 223 Fed. (C. C. A. 2nd) 903 (1915).

[104] Fitter *v.* United States, 258 Fed. (C. C. A. 2nd) 567 (1919).

[105] Perlman *v.* United States, 247 U. S. 7 (1918).

[106] United States *v.* Wilson, 163 Fed. 338 (1908).

[107] Linn *v.* United States, 234 Fed. (C. C. A. 7th) 543 (1916); United States *v.* Hart, 214 Fed. 655 (1914); United States *v.* Hart, 216 Fed. 374 (1914). See also United States *v.* Maresca, 266 Fed. 713 (1920); United States *v.* Barry, 260 Fed. 291 (1919).

[108] United States *v.* Hart, 216 Fed. 374 (1914).

[109] United States *v.* Abrams, 230 Fed. 313 (1916), holding such seizure analogous to a confession improperly obtained. See Bram *v.* United States, 168 U. S. 532 (1897).

[110] See *In re* Tri-State Coal & Coke Co., 253 Fed. 605, 608 (1918), and Fitter *v.* United States, 258 Fed. (C. C. A. 2nd) 567 (1919); United States *v.* Keydoszius, 267 Fed. 866 (1920). See also United States *v.* Brasley, 268 Fed. 59 (1920) where a subpœna *duces tecum* was used.

[111] Stroud *v.* United States, 251 U. S. 15 (1919).

an incident to the administration of a bankrupt's estate[112] is not prohibited because not made as an incident to criminal prosecution,[113] and such matter can, therefore, be used in a subsequent criminal proceeding. So various statutory regulations involving inspection of books and other records have been upheld as incidental to the State's power with respect to taxation, public welfare, etc.[114]

Two important questions remain undecided by the Supreme Court. The first is suggested by the Adams case: Will a seizure of property not covered by the search warrant be condemned? The second follows from the dictum in the Boyd case: Will a search warrant, otherwise valid, be condemned solely on the ground that it is for the purpose of seeking evidence? On the principles laid down in the cases and other authorities it would seem that the answer to both these questions should be affirmative. The precise language of the second part of the Fourth Amendment requiring that the property to be seized be particularly described, demands such answer to the first question. In some of the lower Federal Courts, such cases have accordingly been decided adversely to the Government.[115] The second question has never been squarely presented, but numerous expressions of opinion would indicate that such a search for evidence would be illegal.[116]

[112] Johnson *v.* United States, 228 U. S. 457 (1913). But see Blum *v.* State, 94 Md. 375, 51 Atl. 26 (1902).

[113] See also Public Clearing House *v.* Coyne, 194 U. S. 497 (1904).

[114] See Flint *v.* Stone Tracy Co., 220 U. S. 107 (1911); Public Clearing House *v.* Coyne, 194 U. S. 497 (1904); Co-Op. Building & Loan Assn. *v.* State, 156 Ind. 463, 60 N. E. 146 (1901); Washington Nat. Bk. *v.* Daily, 166 Ind. 631, 77 N. E. 53 (1906); People *v.* Henwood, 123 Mich. 317, 82 N. W. 70 (1900); People *v.* Schneider, 139 Mich. 673, 103 N. W. 172 (1905); State *v.* Stoffels, 89 Minn. 205, 94 N. W. 675 (1903); City of St. Joseph *v.* Levin, 128 Mo. 588, 31 S. W. 101 (1895); State *v.* Hanson, 114 Minn. 136, 130 N. W. 79 (1911); State *v.* Hand Brewing Co., 32 R. I. 56, 78 Atl. 499 (1911); Sister Felicitas *v.* Hartridge, 148 Ga. 832, 98 S. E. 538 (1919); Com. *v.* Mecca Co-Op. Co., 60 Pa. Supr. Ct. 314 (1915); 24 HARV. L. REV. 661; but see United States *v.* Louis. & Nash. R. R., 236 U. S. 318 (1915). See also 25 L. R. A. (N. S.) 818.

[115] United States *v.* M'Hie, 194 Fed. 894 (1912); *In re* Chin K. Shue, 199 Fed. 282 (1912); United States *v.* Friedberg, 233 Fed. 313 (1916); United States *v.* Hill, 263 Fed. 812 (1920); and see United States *v.* Mills (appeal dismissed 220 U. S. 549 (1911)), 185 Fed. 318 (1911); United States *v.* Mounday, 208 Fed. 186 (1913); Flagg *v.* United States, 233 Fed. (C. C. A. 2nd) 481 (1916), disapproving wholesale seizure at time of arrest. See also Rice *v.* United States, 251 Fed. (C. C. A. 1st) 778 (1918) and Colyer *v.* Skeffington, 265 Fed. 17, 44 (1920). See CHAFEE, FREEDOM OF SPEECH, pp. 302–311, for recent raids where the scope of the warrants was exceeded by the executing officers.

[116] Entick *v.* Carrington, 19 How. St. Tr., 1029, 1073 (1765); Boyd *v.* United States, 116 U. S. 616, 623 (1886); Veeder *v.* United States (Certiorari denied 246 U. S.

In this connection it is important to consider the so-called Espionage Act [117] under which the use of search warrants in the Federal Courts has been greatly extended.[118] Before the enactment of this law the use of such warrants had been restricted to revenue, counterfeiting and a few other classes of cases.[119] It was at one time thought that no special statutory authority for the issuance of such warrants was necessary,[120] but the better opinion was otherwise.[121]

The Espionage Act provides that search warrants may be issued under one of three contingencies: (§ 1) "when the property was stolen or embezzled"; (§ 2) "when the property was used as the means of committing a felony"; [122] (§ 3) "when the property, or any paper, is possessed, controlled or used in violation of section 22." [123]

It is therefore significant that Congress has not authorized a search for evidence, and in view of the circumstances under which the Act was passed, it is safe to assume that Congress did not believe that it had constitutional power to do so. It is also worthy of note that this Act is in effect a reproduction of the provisions long existing in the State of New York,[124] which have been declared an embodiment of the historical doctrine.[125]

675 (1918)), 252 Fed. (C. C. A. 7th) 414, 418 (1918); Coastwise Lumber & Supply Co. *v.* United States, 259 Fed. (C. C. A. 2nd) 847, 853 (1919); Haywood *v.* United States, 268 Fed. (C. C. A. 7th) (1920); BLACK, CONST. LAW, 3 ed. (1910), p. 613; COOLEY, CONST. LIM., 7 ed., p. 431; see also Robinson *v.* Richardson, 13 Gray (Mass.), 454 (1859); Lippman *v.* People, 175 Ill. 101, 114, 51 N. E. 872 (1898). See *Addenda* for question certified to the Supreme Court which raises this point.

[117] Act June 15, 1917, c. 30, Title XI, 40 STAT. AT L. 228.

[118] Hough, "Law in Wartime," 31 HARV. L. REV. 692, 698 (1918).

[119] See United States *v.* Jones, 230 Fed. 262 (1916).

[120] United States *v.* M'Hie, 194 Fed. 894, 898 (1912).

[121] United States *v.* Jones, 230 Fed. 262 (1916); see Hough, "Law in Wartime," 31 HARV. L. REV. 692, 698 (1918), and United States *v.* Maresca, 266 Fed. 713 (1920). CHAFEE, FREEDOM OF SPEECH, p. 304.

[122] But under the Prohibition Act search warrants may be issued for a property used in the commission of a misdemeanor. See United States *v.* Friedman, 267 Fed. 856 (1920), and United States *v.* Metzger (Eastern District, New York, 1920) not yet reported.

[123] Sec. 22, 40 STAT. AT L. 230, punishes possession of property or papers in aid of foreign governments and in violation of a penal statute or of United States rights under treaties or international law.

[124] Code, Crim. Proc. § 791 *et seq.*

[125] People *ex rel.* Simpson *v.* Kempner, 208 N. Y. 16, 101 N. E. 794 (1913); United States *v.* Maresca, 266 Fed. 713 (1920). See also United States *v.* Rykowski, 267 Fed. 866, 870 (1920).

The Espionage Act also makes clear the exact limitations upon the issuance of search warrants and in this respect merely conforms to the Constitution [126] and the previous decisions. After (§ 3) paraphrasing the Fourth Amendment with respect to probable cause and particularity of description [127] it provides (§ 5) that the affidavit upon which the warrant is to be granted must state "facts tending to establish the grounds of the application or probable cause for believing that they exist."

This provision should do away with search warrants granted on mere suspicion. Such proceedings have always been declared illegal as in conflict with the Constitution.[128] This rule has been well stated in the Circuit Court of Appeals for the 7th Circuit as follows: [129]

"No search warrant shall be issued unless the judge has first been furnished with facts under oath — not suspicions, beliefs or surmises — but facts which, when the law is properly applied to them, tend to establish the necessary legal conclusion, or facts which, when the law is properly applied to them, tend to establish probable cause for believing that the legal conclusion is right. . . . If the sworn accusation is based on fiction, the accuser must take the chance of punishment for perjury."

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[126] See Coastwise Lumber Co. *v.* United States, 259 Fed. (C. C. A. 2nd) 847, 852 (1919), and Colyer *v.* Skeffington, 265 Fed. 17, 44, 45 (1920).

[127] With respect to the necessity for particularity, see West *v.* Cabell, 153 U. S. 78 (1894); Weeks *v.* United States, 232 U. S. 383, 393 (1914); Hale *v.* Henkel, 201 U. S. 43, 76 (1906); United States *v.* Friedberg, 233 Fed. 313 (1916); Veeder *v.* United States (Certiorari denied 246 U. S. 675), 252 Fed. (C. C. A. 7th) 414, 418 (1918); *In re* Tri-State Coal & Coke Co., 253 Fed. 605 (1918); Haywood *v.* United States, 268 Fed. (C. C. A. 7th) (1920); United States *v.* Friedman, 267 Fed. 856 (1920), and United States *v.* Rykowski, 267 Fed. 866 (1920); Sandford *v.* Nichols, 13 Mass. 286 (1816); Johnson *v.* Comstock, 14 Hun (N. Y.), 238 (1878). For the English rule, see Jones *v.* German (C. of A.) [1897] 1 Q. B. 374.

[128] Rice *v.* Ames, 180 U. S. 371 (1901); United States *v.* Baumert, 179 Fed. 735 (1910); United States *v.* Premises in Butte, Mont., 246 Fed. 185 (1917); Veeder *v.* United States (Certiorari denied 246 U. S. 675 (1918)), 252 Fed. (C. C. A. 7th) 414 (1918); *In re* Tri-State Coal & Coke Co., 253 Fed. 605 (1918); *In re* Rosenwasser Bros., Inc., 254 Fed. 171 (1918); Coastwise Lumber & Supply Co. *v.* United States, 259 Fed. (C. C. A. 2nd) 847 (1919); United States *v.* Maresca, 266 Fed. 713 (1920); see also COOLEY, CONST. LIM., 7 ed., p. 429; United States *v.* Pitotto, 267 Fed. 603 (1920); and United States *v.* Rykowski, 267 Fed. 866 (1920). CHAFEE, FREEDOM OF SPEECH, p. 304.

[129] Veeder *v.* United States (Certiorari denied 246 U. S. 675 (1918)), 252 Fed. (C. C. A. 7th) 414, 418 (1918).

It is, therefore, insufficient to allege mere belief as to the commission of the crime, or even facts stated on information and belief, unless the sources of the information are disclosed.[130] Nor is a statute constitutional which makes such expression of belief equivalent to proof of probable cause.[131] It has, however, been held that the Court in passing upon the validity of the seizure need not confine itself to the affidavit upon which the warrant was issued, but can consider the complaint which has been made and which would be presumed to have been before the commissioner,[132] and even any facts which may have been developed at the hearing before the commissioner, or otherwise between the issuance of the warrant and the determination by the Court.[133] These rulings do not seem to be sound in principle, but the second one is apparently based on sections 15 and 16 of the Espionage Act. It is submitted that they violate the requirements of the Constitution on the subject, especially if the seized property is relied upon to establish the existence of probable cause.

Warrants have been found sufficient in a number of cases[134] but despite the decisions and the plain language of the Espionage Act as to probable cause, many warrants appear to have been improperly granted.[135] The warrant may not be issued for private ends, but only in criminal, or quasi-criminal proceedings.[136]

[130] Rice *v.* Ames, 180 U. S. 371 (1901); United States *v.* Baumert, 179 Fed. 735 (1910); Ripper *v.* United States, 178 Fed. (C. C. A. 8th) 24 (1910); *In re* Rosenwasser Bros., Inc., 254 Fed. 171 (1918); United States *v.* Michalski, 265 Fed. 839 (1919); Johnson *v.* Comstock, 14 Hun (N. Y.), 238 (1878). See People *ex rel.* Livingston *v.* Wyatt, 186 N. Y. 383, 79 N. E. 330 (1906). But see Jones *v.* German (C. of A.) [1897] 1 Q. B. 374 for the English view. See notes in 1 Ann. Cas. 650; 18 Ann. Cas. 817.

[131] Lippman *v.* People, 175 Ill. 101, 51 N. E. 872 (1898). See 12 HARV L. REV. 505.

[132] *In re* Rosenwasser Bros., Inc., 254 Fed. 171 (1918).

[133] United States *v.* Gouled, 253 Fed. 770 (1918); United States *v.* Maresca, 266 Fed. 713 (1920). See also Haywood *v.* United States, 268 Fed. (C. C. A. 7th) (1920).

[134] Beavers *v.* Henkel, 194 U. S. 73 (1904); United States *v.* Gouled, 253 Fed. 770 (1918); *In re* Rosenwasser Bros., Inc., 254 Fed. 171 (1918); United States *v.* Friedman, 267 Fed. 856 (1920); Jones *v.* German (C. of A.) [1897] 1 Q. B. 374. See COOLEY, CONST. LIM., 7 ed., pp. 429–430. But see *Addenda.*

[135] Veeder *v.* United States, 252 Fed. (C. C. A. 7th) 414 (1918); *In re* Tri-State Coal & Coke Co., 253 Fed. 605 (1918); *In re* Marx, 255 Fed. 344 (1918); Coastwise Lumber & Supply Co. *v.* United States, 259 Fed. (C. C. A. 2nd) 847 (1919); United States *v.* Maresca, 266 Fed. 713 (1920); Haywood *v.* United States, 268 Fed. (C. C. A. 7th) (1920); United States *v.* Pitotto, 267 Fed. 603 (1920); United States *v.* Rykowski, 267 Fed. 866 (1920). CHAFEE, FREEDOM OF SPEECH, pp. 302–311.

[136] Robinson *v.* Richardson, 13 Gray (Mass.), 454 (1859); People *ex rel.* Simpson

Although the Fourth Amendment does not prevent the production of books and papers on a trial,[137] it has been held, as a result of a dictum in the Boyd case, that a production compelled by subpoena *duces tecum* is subject to the same rules with respect to reasonableness as govern a search warrant. A subpoena was accordingly declared unreasonable because it called for the production of all contracts and correspondence with a large number of concerns over a long period of time.[138]

As the executing officer has no discretion to omit any of the things specified in the warrant it should appear from the affidavit that the facts justify the seizure of all the property; otherwise the warrant should be quashed.[139] So improper execution of the warrant renders the whole proceeding defective — as where the proper officer was not present at the time,[140] or where the marshal exceeded the scope of the warrant.[141]

The Espionage Act (§§ 7–14) prescribes the various things to be done by the executing officer and also (§§ 15, 16) affords the owner an opportunity of contesting the seizure before the judge or commissioner who issued the warrant. Prior to the passage of the Espionage Act it had been held that the motion could be made only where the papers were in the custody of the Court, or at least

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v. Kempner, 208 N. Y. 16, 101 N. E. 794 (1913); Lippman *v.* People, 175 Ill. 101, 51 N. E. 872 (1898). See also Sanford *v.* Richardson, 176 App. Div. 199, 161 N. Y. Supp. 1026 (1916); and Matter of Ehrich *v.* Root, 134 App. Div. 432, 119 N. Y. Supp. 395 (1909).

[137] I. S. C. C. *v.* Brimson, 154 U. S. 447 (1894); *In re* Chapman, 166 U. S. 661 (1897); I. S. C. C. *v.* Baird, 194 U. S. 25 (1904); Hale *v.* Henkel, 201 U. S. 43, 73 (1906); Flint *v.* Stone Tracy Co., 220 U. S. 107, 174 (1911); Matter of Mohawk Overall Co., 210 N. Y. 474, 104 N. E. 925 (1914). But see *In re* Jefferson, 96 Fed. 826 (1899), where a wife's testimony in bankruptcy was excluded. See also United States *v.* Brasley, 268 Fed. 59 (1920).

[138] Hale *v.* Henkel, 201 U. S. 43, 74, 76, 77 (1906). See also Wilson *v.* United States, 221 U. S. 361, 382 (1911); United States *v.* Louis. & Nash. R. R., 236 U. S. 318 (1915); Taft, "The Tobacco Trust Decisions," 6 COL. L. REV. 375 (1906). But see Cons. Rendering Co. *v.* Vermont, 207 U. S. 541, 554 (1908), and United States *v.* Watson, 266 Fed. 736 (1920), where similar subpœnas were declared not unreasonable. See also Matter of Mohawk Overall Co., 210 N. Y. 474, 104 N. E. 925 (1914), and Matter of Foster, 139 App. Div. 769, 124 N. Y. Supp. 667, 675 (1910).

[139] Veeder *v.* United States (Certiorari denied 246 U. S. 675 (1918)), 252 Fed. (C. C. A. 7th) 414, 418 (1918).

[140] United States *v.* M'Hie, 194 Fed. 894, 898 (1912).

[141] See United States *v.* Mills (appeal dismissed 220 U. S. 549 (1911)), 185 Fed. 318 (1911); United States *v.* Friedberg, 233 Fed. 313 (1916).

only after a proceeding had been instituted, and therefore not to recover property seized by revenue officers and still held by them.[142] It is submitted that section 16 of this Act authorizes the making of such motion, at least where a warrant had been issued, regardless of what branch of the Government was concerned in the seizure.

A curious question of practice has also arisen in this connection. In at least one case, the District Court has entertained a motion to review the seizure despite a previous hearing by the commissioner,[143] but in a recent case it was held that the commissioner was acting as a court of co-ordinate jurisdiction so that the District Court could not review his order.[144] But it has been held that no appeal lies to the Circuit Court of Appeals from an order of the District Court denying a motion for return, on the ground that the order is interlocutory and that it can only be reviewed on appeal from a judgment of conviction,[145] — except where the motion is made by one not a party to the proceeding.[146] The result of these rulings is that there is no way except after conviction by which a defendant can review an order made by the commissioner denying a motion to return seized property.

Where it is conceded that the seizure was illegal it is not proper to withhold the papers because it is claimed that they belong to the United States: they should be restored "to that possession from which they never should have been taken,"[147] although contraband property will not be returned.[148] It has also been decided that mere delay in making the motion, or informality in the papers is no ground for denial.[149] Nor should such motion be de-

[142] United States *v.* Hee, 219 Fed. 1019 (1915); *In re* Chin K. Shue, 199 Fed. 282 (1912).

[143] *In re* Tri-State Coal & Coke Co., 253 Fed. 605 (1918).

[144] United States *v.* Maresca, 266 Fed. 713 (1920).

[145] Coastwise Lumber & Supply Co. *v.* United States, 259 Fed. (C. C. A. 2nd) 847 (1919), but see dissenting opinion urging that such motion is an independent proceeding.

[146] Veeder *v.* United States (Certiorari denied 246 U. S. 675 (1918)), 252 Fed. (C. C. A. 7th) 414 (1918). See United States *v.* Maresca, 266 Fed. 713 (1920); Coastwise Lumber & Supply Co. *v.* United States, 259 Fed. (C. C. A. 2nd) 847 (1919).

[147] *In re* Marx, 255 Fed. 344 (1918).

[148] United States *v.* Rykowski, 267 Fed. 866 (1920) (liquor stills). See also United States *v.* "The Spirit of '76" (1917), Department of Justice, Bulletin No. 33 (moving picture).

[149] Laughter *v.* United States, 259 Fed. (C. C. A. 6th) 94 (1919). But see Farmer *v.* United States, 223 Fed. (C. C. A. 2nd) 903 (1915).

nied because the District Attorney has voluntarily returned the books and papers after he has obtained all the necessary information from them.[150] The Court should always direct the return not only of the papers seized, but also of any "copies, photographs or memoranda thereof, made since the same were taken." [151]

The remedy for illegal searches and seizures by motion is thus well established. Those who may object that this effective enforcement of the constitutional guaranty may impede the arm of the Government should consider well the opinion of Mr. Justice Davis in that case which represents the high-water mark of civil liberties, *Ex parte* Milligan: [152]

"Those great and good men foresaw that troublesome times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world has taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government." [153]

Addenda. Since the above was originally written there has come to the writer's attention the fact that the Circuit Court of Appeals for the Second Circuit has certified to the Supreme Court in the case of *Gouled* v. *United States*, 264 Fed. 839 (1920), a number of questions bearing on the subject of this article. In that case certain papers were taken without a warrant as the result of artifice, another paper was taken under a warrant charging an offense other than the one for which the defendant was indicted and tried, and still other papers were taken under a warrant which in effect au-

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[150] Flagg *v.* United States, 233 Fed. (C. C. A. 2nd) 481, 483 (1916).

[151] *In re* Tri-State Coal & Coke Co., 253 Fed. 605, 608 (1918); United States *v.* Brasley, 268 Fed. 59 (1920).

[152] 4 Wall. (U. S.) 2 (1866). In that case a sentence of death imposed by a court martial and approved by President Lincoln, was set aside on the ground that the accused was entitled to trial in the regular criminal courts.

[153] *Ibid.*, 120, 121.

thorized a search for evidence. The approaching decision of the Supreme Court should, therefore, chart fully the important spaces left untouched by the Boyd, Adams, and Weeks cases.

The following are the questions certified:

"1st. Is the secret taking or abstraction without force by a representative of any branch or subdivision of the Government of the United States of a paper writing of evidential value only, belonging to one suspected of crime and from the house or office of such person, a violation of the Fourth Amendment?

"2nd. Is the admission of such paper writing in evidence against the same person when indicted for crime a violation of the Fifth Amendment?

"3rd. Are papers of no pecuniary value, but possessing evidential value against persons presently suspected and subsequently indicted under Sections 37 and 215, U. S. C. C., when taken under search warrants issued pursuant to Act of June 15th, 1917, from the house or office of the person so suspected, seized and taken in violation of the Fourth Amendment?

"4th. If such papers so taken are admitted in evidence against the person from whose house or office they were taken, such person being on trial for the crime of which he was accused in the affidavit for warrant, is such admission in evidence a violation of the Fifth Amendment?

"5th. If in the affidavit for search warrant under Act of June 15th, 1917, the party whose premises are to be searched be charged with one crime and property be taken under the warrant issued thereon, can such property so seized be introduced in evidence against said party when on trial for a different offense?

"6th. If papers of evidential value only be seized under a search warrant and the party from whose house or office they are taken be indicted — if he then move before trial for the return of said papers and said motion is denied — is the Court at trial bound in law to inquire as to the origin of or method of procuring said papers when they are offered in evidence against the party so indicted?"

The author sees no reason for doubting the soundness of the decisions in *United States* v. *Maresca*, 266 Fed. 713 (1920), on the first question, in *United States* v. *Murphy*, 264 Fed. 842 (1920), on the fifth question, and in *United States* v. *Hill*, 263 Fed. 812 (1920), on the sixth question. Under Wigmore's analysis and *Adams* v. *New York*, 192 U. S. 585 (1903), negative answers may be expected to the second and fourth questions — see *Haywood* v. *United*

States, 268 Fed. (C. C. A. 7th) ooo (1920). An affirmative answer may be expected to the important third question, qualified probably as indicated in *MacKnight* v. *United States*, 263 Fed. (C. C. A. 1st), 832 (1920), and in *Haywood* v. *United States*, 268 Fed. (C. C. A. 7th) (1920).

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